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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1964**

**No. 256**

**BILLIE SOL ESTES,**

*Petitioner,*

**v.**

**THE STATE OF TEXAS,**

*Respondent.*

**On Writ of Certiorari to the Court of  
Criminal Appeals of Texas**

**BRIEF OF THE STATE BAR OF TEXAS  
AS AMICUS CURIAE**

**For the State Bar of Texas:**

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Duke W. Dunbar, Attorney General, The State of Colorado, acting on behalf of the Supreme Court of Colorado, joins in this brief and urges that the judgment be affirmed.



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## BRIEF OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

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Letters from attorneys for both parties consenting to the filing of this brief are on file with the Clerk.

### Question Presented

Is the judge in a state criminal trial required by the due process and equal protection clauses of the Fourteenth Amendment to order the total exclusion of live television coverage from any and all portions of the trial upon objection by the defendant?

### Interest of the State Bar of Texas as Amicus Curiae

The Judicial Section of the State Bar of Texas is composed of the judges of the county courts at law

and the district and appellate courts of Texas. Among the Canons of Judicial Ethics approved by the Judicial Section on September 27, 1963, is Canon 28, which permits the trial judge in his discretion to allow live television coverage of portions of a trial subject to certain limitations. These Canons, which had been under study since 1956, are advisory only, and do not have the status of rules of court. They do, however, express the opinion of the Judicial Section as to desirable ethical standards for judges.

The position has been taken by petitioner and by the American Bar Association in its *amicus curiae* brief that the due process and equal protection clauses of the Fourteenth Amendment assure to an accused in a state criminal trial the absolute right to require the exclusion of live television coverage from any portion of his trial. The (American Bar) Association further takes the position in effect that this right to exclude live television is of the same dignity as such specific Sixth Amendment guarantees as the right to an impartial judge and jury, the right of confrontation, and the right to counsel, and that therefore specific prejudice resulting from television coverage need not be shown. This position is of course incompatible with an expressed policy of the Judicial Section of the State Bar.

The Association's brief is laced with statements describing possible results of televised trials and assertions to the effect that "the trial was televised." The State Bar fears the cumulative effect of these statements is to induce the impression that the trial was televised to a far greater extent than was so. The Association's brief devotes considerable space to the disturbing effects of live television on witnesses and counsel both on direct and on cross-examination. This con-

tention is rendered less persuasive when it is realized that there *was no* live television during the taking of any testimony on the merits at petitioner's trial.

The Association has long been a distinguished leader of the bar with a genuine interest in the improvement of the administration of justice in this country. This leadership and interest have been demonstrated often and effectively by action as well as affirmation. The prestige of the Association lends great weight to efforts supporting worthy reforms and objectives. Conversely, when that prestige supports an erroneous position, the possibility of harm is greater. Since the State Bar is convinced of the error of the Association's position, we feel constrained to present an opposing view to demonstrate what we conceive to be the error in its analysis. We express no opinion as to petitioner's guilt or innocence.

### Statement

The State Bar accepts the statements that appear in the briefs of petitioner and the Association except as they conflict with the following designation of the only four portions of the trial which were actually telecast on live television:

1. A hearing on petitioner's motion to prohibit telecasting and for a continuance held on September 24 and 25, 1962 (R. 18, 82). The *only* testimony offered during this hearing was in support of the motion to prohibit telecasting (R. 19). The motion for continuance was granted, and the trial reset for October 22, 1962 (R. 19).
2. The opening argument for the State (R. 20, 25).
3. The closing argument for the State (R. 17, 25, 134).

4. The return of the verdict by the jury and its acceptance by the Court (R. 20).

During the voir dire examination of the jury and the taking of testimony no live television or radio broadcasting was permitted, but the television cameras were permitted to make film or tapes *without sound* (R. 19, 20, 25, 108, 131). During this period the television cameras were operated only at intervals, and the film or tapes were used for the purpose of providing silent background film for regular television newscasts (R. 19, 20, 131).

### **Summary of Argument**

The question of live television trial coverage is relevant to the demands of due process to the extent that it interferes with the constitutional rights of an accused. However, an accused has no constitutional right to require the total exclusion of live television coverage from his trial. Experience indicates that controlled live television coverage is consonant with the requirements of the due process and equal protection clauses. Whether an accused is denied due process and the equal protection of the laws by controlled and limited live television coverage of his trial is a question of fact. The constitution should not be read as restricting the right of the public to acquire knowledge unless that restriction is demonstrably necessary.

### **ARGUMENT**

#### **I**

The history of Canon 35 does not reflect that an accused has the constitutional right to exclude live television coverage from all portions of his trial.

Beginning on Page 3 of its brief the Association

attempts to trace "the development of (its) position that the Canon (35) embodies the constitutional principle here involved." The State Bar recognizes that the Fifth, Sixth, and Fourteenth Amendments guarantee to an accused the right to a fair and impartial jury and judge, the right of confrontation, and the right to counsel. The State Bar shares the Association's concern that no accused be denied these basic rights. However, the Association claims that Canon 35 embodies a new concept of constitutional dimensions; that is, that the Fifth, Sixth, and Fourteenth Amendments guarantee to an accused in a state criminal trial that no portion of his trial shall be televised over his objection. The State Bar does not agree that this is a right of constitutional dimensions and does not feel that the asserted development of this position is demonstrated in the brief or elsewhere.

At least twenty articles bearing on the merits of Canon 35 have appeared in the American Bar Association Journal during the past ten years. Some have been favorable to Canon 35 and some unfavorable. Many of these articles have been written by authorities well qualified to speak on constitutional matters; for example, Justice William O. Douglas, judges of the United States Courts of Appeal and District Courts, Dean Erwin Griswold of Harvard Law School, and eminent practicing lawyers. In none of these articles has the position been taken that the defendant's right to exclude live television coverage of his criminal trial is itself a right of constitutional dimensions. If this were a constitutionally protected right, would that not be the strongest single argument in favor of the Canon 35 approach? Would not the proponents of Canon 35 have made this point before discussing its merits as merely the most appropriate among legitimate alternative approaches? Conversely, if any op-

ponent of Canon 35 had knowledge of such an argument, would that not be the first point he would dispute? If he fails to overcome that argument he fails in all, since there would be no lawful alternative to the approach of Canon 35. The very pages of the Association's own Journal fail to reveal the development of its position.

The preamble to the Association's Canon of Judicial Ethics\* reveals no purpose other than to declare desirable ethical standards for judges in their personal practice. This is a laudable purpose, but it indicates no intention to express constitutional imperatives.

## II

**Analysis of Canon 35 indicates that the asserted right of an accused to require total exclusion of live television coverage from his criminal trial is not a right of constitutional dimensions, but is merely one approach to the objective of a fair trial.**

To understand fully the position of the Association it is helpful to analyze the constitutional principles which Canon 35 assertedly embodies and Canon 28 assertedly abridges. These principles are discussed in the Association's brief, and relate generally to the right of an accused to have a fair trial. Specifically,

**\*Preamble, Canons of Judicial Ethics of the American Bar Association:**

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

the relevant constitutional principles concern the right to an impartial judge and jury, the right to counsel, and the right of confrontation.

The conduct of a criminal trial involves many procedures and interests which must be resolved so as to secure these rights to an accused. There are many different approaches to the resolution of these problems. There are at least two approaches to the problem of securing these essential rights to an accused *vis a vis* live television coverage of his trial. One approach is to eliminate all live television as contemplated by Canon 35. Another approach is to permit live television under limited and controlled conditions. The Association has confused the *approach* with the *principle* which is sought to be preserved. Total elimination of live television coverage is an approach which assures that an accused will not be deprived of his constitutional rights by reason of live television coverage. This states the obvious. However, it is quite a different thing to say that this approach is the constitutional right.

The State Bar sees no need to discuss the difficult problems of balancing or "federalism" (see petitioner's brief, pp. 23 & 24); that question involves the extent to which constitutional protections imposed against federal action should be imposed against state action. The State Bar's position is that a defendant has no right of constitutional dimensions, even on the federal level, to demand the total exclusion of live television coverage from all portions of his criminal trial.

In *Roth v. United States*, 354 U.S. 476, 505 (1957), Justice Harlan wrote that each of the states of the Union may be viewed as an experimental laboratory in which various solutions to various problems are undertaken. This comment was made in a case in which

the balancing problem was in issue and where there was an unquestioned federal right at stake; i.e., freedom of expression. The comment has a *fortiori* application where no such right is at stake.

This characterization as an "experimental laboratory" appropriately describes the position of Texas and Colorado, two states which permit live television coverage of criminal trials under controlled conditions. The experience in these states may be of great assistance in demonstrating the compatibility *vel non* of live television techniques with the constitutional requirements inherent in the concept of due process. Yet how can these experiences be meaningful unless actual results are examined? If experience shows there exists the probability that live television has such an insidious effect on the judicial process that even partially televised trials will result in a denial of due process, then there will be a rational and demonstrable basis for the claim that due process requires the total exclusion of live television cameras from the courtroom.

It was stated in *Roth, supra*, that:

"Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided." 354 U.S. at 502.

If this statement is true of a problem as old as obscenity, then how much truer it is of a development as new as television. Our knowledge of the bearing which controlled live television coverage might have on criminal trials is limited. The Association's brief contains an exhaustive recital of results, all disagreeable and some unconstitutional, which might occur if a trial were televised in its entirety, and if the participants and witnesses were susceptible to abnormal behavior patterns triggered by mere awareness of the television

cameras. However, no nexus has been shown to exist between what appears to be the Association's classic conception of a televised trial and the proceedings which actually occurred at petitioner's trial.

We respect the Association's position insofar as it expresses a preference for the approach taken by Canon 35 over that taken by Canon 28. However, the Judicial Section of the State Bar is aware of the guarantees of a fair trial inherent in the Fifth, Sixth, and Fourteenth Amendments. The approach reflected by Canon 28 is an attempt to assure the observance of these guarantees. That this approach is at variance with that reflected by Canon 35 is little reason to say that the constitutional principles "embodied" in it are also different.

The exercise of the Court's supervisory powers in the promulgation of Rule 53 of the Federal Rules of Criminal Procedure does not elevate the approach taken by Canon 35 to the level of an independent constitutional guarantee.

The State Bar does not claim prescience as to the ultimate resolution of the problem of televised trials. The State Bar's position is only that the approach of Canon 28 is an appropriate one, particularly in view of the paucity of current empirical knowledge about the problem. Experience may or may not indicate that a different approach should be taken. However, the rather polemical brief filed by the Association is not persuasive that the proceedings in petitioner's trial so indicate. It is a simple matter to imagine what may happen when a trial is televised; this is appropriately done in legal periodicals. In a case appearing before this Court, however, it is reasonable to expect that some connection be made between the imagined and the actual results.

### III

**The mere fact that portions of a criminal trial are televised is not itself a denial of due process.**

It is stated in the Association's brief in a footnote on Page 21 that:

"... petitioner is entitled to a new trial without having to show specific prejudice. For example, denial of the right to counsel justifies a reversal and a new trial without any inquiry into whether the presence of counsel would have resulted in acquittal. . . . Similarly with the right of confrontation, a defendant need not show that had he been allowed to cross-examine, the witness would have departed from his original testimony. . . ."

This quotation, while true enough as far as it goes, reveals the error in the Association's analysis. Specific prejudice resulting from the denial of these basic rights need not be shown, but there must be a showing of a denial of the right itself. An accused certainly has the right to object to live television coverage of any portion of his criminal trial. But the Association says that this right is of the same dignity and dimension as such specific Sixth Amendment guarantees as his right to counsel and his right of confrontation, and that, therefore, specific prejudice need not be shown. This reads into the Constitution a meaning not warranted by the present state of our knowledge of the effects of live television coverage on criminal trials.

The rights guaranteed to individuals by the due process clause of the Fourteenth Amendment are mature, deliberate, and appropriate responses to felt needs. The mere fact that live television coverage of a criminal trial may result in the denial of a fair trial does not require its total exclusion as a matter of constitutional right. The confession of an accused may be

coerced; the practice of admitting it in evidence carries with it that very real danger. Yet confessions are regularly admitted notwithstanding the difficulty facing the accused in establishing that it may have been coerced.

The fact that gray areas exist is no reason to eliminate every factor which may contribute to them. An accused has certain rights specified in the Sixth Amendment, just as he has protection against the introduction in evidence of a coerced confession in the Fifth and Fourteenth Amendments. However, it does not follow that an activity which under *some* circumstances may impinge on those rights should under *all* circumstances be eliminated.

#### IV

Analysis shows that the terms of Canon 35 have no bearing on petitioner's trial except in matters of court decorum and dignity.

An analysis of the specific provisions of Canon 35 as applied to the proceedings in petitioner's trial reveals another difficulty in the Association's position that the approach of Canon 35 is a constitutional imperative. Three factors are recited in Canon 35 as requiring the blanket strictures imposed on live television trial coverage:

1. It detracts from the essential dignity of the proceedings.
2. It distracts participants and witnesses in giving testimony.
3. It creates misconceptions with respect thereto in the mind of the public.

In petitioner's trial neither participants nor witnesses were on live television during the taking of testimony.

Therefore, it can neither be said that they were distracted by it during this critical period nor that misconceptions with respect to the testimony were created in the mind of the public. The only factors relevant to petitioner's trial are that the limited live television coverage may have detracted from the essential dignity of the court and may have created misconceptions in the mind of the public with respect to the proceedings televised. It cannot be doubted that the dignity of the proceedings is a serious and important aspect of judicial administration. But surely it stretches the point to say that a practice which *may* in some degree detract from that dignity is a violation of petitioner's constitutional rights even without a showing of specific prejudice.

We strongly resist the contention that the limited live television coverage present in his trial was *per se* a violation of any right guaranteed to him by the Fifth, Sixth, or Fourteenth Amendments.

## V

**Actual experience does not support the constitutional argument made by the American Bar Association.**

Much of the criticism directed toward live television trial coverage comes from those who have had little or no actual experience with it. Often the information available to them is incomplete and misleading. Such reports as the one quoted in the Association's brief, p. A-9, attributed to the *New York Times*, stating that "a microphone stuck its 12-inch snout inside the jury box," offer little basis for meaningful opinions.

Those of little actual experience with this problem are rightly heard. Full debate is desirable. However, this is not an area where *a priori* knowledge is entitled

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to more respect than that supported by experience. Yet it is implicit in the attitudes of many who support Canon 35 that those who oppose it do so because of preconceived notions, because of pressure from vested interests, or just because of the inclination to defend any position once taken. The position of the State Bar is simply that actual experience does not support the constitutional argument made by the Association. If this position is incorrect, then it should be possible to point out how experience does support the constitutional argument made by the Association. The State Bar would welcome, but has not yet seen, such an analysis.

In December of 1955 a murder trial held in Waco, Texas, was televised in its entirety. The American Bar Association asked Abner V. McCall, then President of the local bar association and Dean of the Baylor University Law School, to audit the trial and prepare a report of the proceedings. This report was prepared by a committee of the Waco-McLennan County Bar Association under Dean McCall's direction, and was published in the February 1956 issue of the *Texas Bar Journal*. The report, unusual in that it is a full and objective appraisal of a televised trial, should be of interest to the Court; for this reason it is attached as an appendix to this brief. The report included post-trial interviews with the participants and witnesses. They expressed no objection to the television coverage. The Association's constitutional argument is not supported.

The record in petitioner's own case is another concrete example that controlled live television coverage of a trial is consonant with due process requirements. None of the testimony on the merits was televised. It was stated by the Court and defense counsel that the televised pretrial motions revealed no facts or evidence

bearing on the merits (R. 19, 63). The jurors were not permitted to separate. It is clear that they did not spend their evenings watching themselves on television, being exposed to repetitions of the most exciting testimony, being accosted by strangers, listening in on bench conferences, or hearing inadmissible evidence (see Association brief 12, 13; A.C.L.U. brief 11, 12).

The arguments and speculations about what *might* happen in a televised trial are met convincingly by what *did* happen in petitioner's trial.

## VI.

**The mere fact that portions of a criminal trial are televised is not itself a denial of the equal protection of the laws.**

On Page 21 of the Association's brief it is stated that:

"Since the presence of television in the courtroom has the inevitable effect of invading petitioner's basic trial rights, . . . any rule or practice which gives the trial judge discretion to permit the televising of judicial proceedings will automatically deny the petitioner the 'equal protection of the laws'."

In making this statement the Association presupposes that the presence of live television is *per se* a denial of due process. Thus the Association is saying only that one who has been denied due process has also been denied the equal protection of the laws. We concede this; we do not concede the validity of the presupposition on which the statement is based.

The State Bar's position is that controlled and limited live television is consonant with the requirements of due process. Thus viewed, the granting of media

requests for live television of a trial under limited and controlled conditions is not a denial of the equal protection of the law.

The Association also says on Page 21 of its brief that:

"The practical effect of such discretion is that the judge will be confronted with media requests only in those cases involving the famous or the infamous; the deleterious effects of television will be visited on them alone."

This overlooks the fact that when operated under limited and controlled conditions live television is little different from the other mass communication media, all of which contribute to the mass of publicity directed toward a defendant. The whole purpose of controlling and limiting the operation of live television is to eliminate the problems which might result from its untrammelled operation. Under these controlled conditions the statement quoted above says little more than that the famous or infamous are most damaged by publicity. This is so by definition.

If the due process clause of the Fourteenth Amendment gives an accused the absolute right to require the total exclusion of live television coverage from all phases of his criminal trial, then to permit any live television coverage over his objection denies him the equal protection of the laws. Similarly, if an accused does not actually receive a fair trial because of live television coverage (or for any other reason) he also has been denied the equal protection of the laws. These statements mirror a rather obvious connection between a denial of due process and the consequent denial of equal protection. However, if the Association is attempting to rely on the equal protection clause as requiring the *automatic* reversal of petitioner's conviction

tion, independent of considerations of specific prejudice and due process, then we must take issue.

The Association's brief is not persuasive that the increment added by the presence of controlled and limited live television to the mass of publicity already present in a criminal trial is automatically a denial of the equal protection of the laws. The publicity attendant upon most criminal trials occurs in the pre-trial stages. Certainly it is common knowledge that petitioner was the subject of many newspaper and magazine articles as well as radio and television newscasts in the months before his trial. His name and picture were constantly before the public during this period, and they appeared in all the mass communications media. It is pointed out in the Association's brief (p. 21) that only the trials of the most famous or infamous will be "televised." It is implicit in this statement that the public already has a great deal of information about the accused. It seems unrealistic to say that the spectators, witnesses, and prospective jurors who walked into the Courthouse in Tyler and saw television and camera equipment were suddenly seized with the knowledge that there was widespread public interest in the Estes trial. Television is now a part of the daily life of almost everyone in this country. Portions of other trials in Judge Dunagan's Court have been televised (R. 109). It is a common occurrence not only in Tyler (R. 109) but throughout Texas to see television newscasts which show silent film or tapes of court proceedings while the television newscaster describes the day's happenings. One wonders at the effect on witnesses and jurors of a courtroom full of press reporters diligently, silently, and grimly taking notes during an entire trial. The point we are making is that it is not proper to attribute to live television trial

coverage blame for more than its share of trial publicity.

It is stated on Page 11 of the *amicus curiae* brief filed by the American Civil Liberties Union that:

"The mere fact that Estes' jurors were instructed to disregard newspaper and television comments on the case . . . was also ineffective in light of the *overwhelming likelihood* of extraneous information reaching jurors through television." (Emphasis added.)

We ask the Court to consider, as a general matter, how much of that "overwhelming likelihood" it is proper to attribute to the live television coverage of any trial. However, it is puzzling in the extreme that the American Civil Liberties Union should make this claim with particular respect to "Estes' jurors" in view of Art. 668 of the Texas Code of Criminal Procedure:

"Art. 668. Separation of jury

After the jury has been sworn and impaneled to try *any felony* case they shall *not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer.*" (Emphasis added.)

Since the jurors were not permitted to separate, it is wrong to say that the judge's instructions were "ineffective." They had no opportunity to watch television during the trial or to read newspaper accounts of it.

The American Civil Liberties Union on p. 4 of its brief recognizes a distinction between pre-trial publicity and live television trial coverage. However, it does not follow that since the latter *can* be totally elim-

inated it *should* be. After referring to the cases of *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Stroble v. California*, 343 U.S. 181 (1952), and *Irvin v. Dowd*, 366 U.S. 717 (1961), and pointing out that these cases involved pre-trial publicity, the brief states that:

“... where a court can eliminate *this substantial threat to a fair trial simply by barring telecasting of the proceedings*, it is unconscionable for a defendant to be exposed to such intensive publicity.”  
(Emphasis added.)

This comment equates the nature of the pre-trial publicity in these three cases with the nature of the live television coverage present in the *Estes* trial. In these three cases a total of eight people were murdered and three were kidnapped. The locales in which these cases were ultimately tried were saturated with publicity concerning the facts and details of these crimes, including among other things the confessions of all three defendants. Each of these defendants was sentenced to death. Is it then appropriate to say in the context of the present case that “this substantial threat to a fair trial” can be eliminated “simply by barring telecasting of the proceedings”? We ask the Court to examine what actually happened in this trial. It is certainly a misstatement of the facts to say, as does the American Civil Liberties Union on page 2 of its brief, that: .

“*From the outset the proceedings were televised live, the trial court overruling petitioner’s constitutional objection to television coverage.*” (Emphasis added.)

## VII

**The right of the public to acquire knowledge is a fundamental concept in the history of this nation,**

and it should not be limited unless there is a compelling need and unless the limitation is responsive to the need.

It is not our purpose to attack Canon 35, and we make no claim that it abridges the First Amendment guarantees of freedom of the press. However, we do take issue with the assertion made in the following comment appearing on p. 11 of the Association's brief:

"What is involved is not freedom of expression but *simply the regulation of access to the courtroom by certain media equipment.*" (Emphasis added.)

We submit that it is not "simply" a matter of access by certain media equipment. There is nothing sacrosanct about a television camera or the printed or spoken word. Their relevance and the *raison d'être* of the free speech and press provisions of the First Amendment lie in their bearing on the right of the public to *know*. The Founding Fathers knew, as we all do, that where a government is responsive to the will of the governed, that will must be the expression of an informed electorate. The fundamental purpose of the First Amendment was not to protect newspapermen. Its purpose was and is to assure to the public the broadest possible opportunity to acquire knowledge. And for purposes of creating a society capable of maintaining high standards of self-government that knowledge which is most important relates to the very functioning of the government itself. Thus the right of the public to *know* is a right of fundamental importance.

Certainly there are limitations on this right. It is limited in matters affecting the national security. Grand jury proceedings generally are not subject to public scrutiny. However, these limitations must not

be lightly imposed. This right must not be restricted unless there is some compelling need *and* unless there is a reasonable empirical basis which indicates that the restriction is required to meet the need.

We submit that much of the analysis contained in the Association's brief is general and based on speculation unrelated to the events which actually occurred in the Estes trial. We think that the constitutional interpretation urged by the Association is unwise.

The means of mass communication have been greatly improved since adoption of the First and Fourteenth Amendments. The new methods and techniques are no less important than the old. The complexity of the modern world requires the fullest use of these techniques to assure the widespread dissemination of information and ideas, so long as that use does not interfere with other basic rights. In the context of an appeal to this Court it should be shown that there actually was such an interference.

It must be remembered that none of the testimony was televised live. The testimony was only recorded at sporadic intervals, and then on tape or film *without sound*. When the main force of the argument is directed at the disturbing effects of live television coverage during the taking of testimony, is it appropriate to apply it to a case in which there was no live television coverage during that period?

The arguments of the petitioner, the Association, and the American Civil Liberties Union do not constitute a sound basis for making the reversal of this case a constitutional imperative. Whether petitioner was denied due process and the equal protection of the laws by the controlled and limited live television coverage of his trial is a question of fact.

## **Conclusion**

*For the reasons stated, the judgment should be affirmed.*

For the State Bar of Texas:

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**March 16, 1965**

**BAYLOR UNIVERSITY**

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**Waco, Texas 76703**

**March 11, 1965**

Mr. Davis Grant  
General Counsel  
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Austin, Texas

Dear Mr. Grant:

In reply to your inquiry as to the televising of the trial of State v. Washburn in 54th District Court in Waco, Texas, in December, 1955, you will find a report thereof in the February, 1956 issue of the State Bar Journal.

There was general publicity when Judge D. W. Bartlett of the 54th District Court announced that television station KWTX of Waco would be permitted to televise the entire trial. This was reported to be the first time a trial was to be televised. At the time I was the dean of the School of Law of Baylor University and was also serving that year as president of the McLennan County Bar Association. I received a telephone call from the chairman of the committee of the American Bar Association concerned with such matters requesting that we arrange to observe the trial and the effects of the television and make a report thereon to the committee. He offered to reimburse us for the necessary expenses.

I arranged with Mr. Cullen Smith and Mr. Hilton H. Howell, two young Waco attorneys, to cover the trial, survey the effect of televising it and make a report thereon to the American Bar Association committee. This they did. At the request of some official of the State Bar of Texas they also prepared from their report an article for the State Bar Journal, published in February, 1956.

Sincerely,



Abner V. McCall  
President

AVM:cp

## **APPENDIX**

### **REPORT OF WASHBURN TRIAL TELECAST**

Prepared by Waco-McLennan County Bar Association

In Waco on December 6, 1955, in the 54th Judicial District Court of McLennan County, Texas, the trial of Harry L. Washburn began. He had been indicted for murder with malice of Mrs. Harry Weaver, his former mother-in-law, who was killed in the explosion of a bomb as she entered her car parked in the garage of her San Angelo home.

On December 9, at 6:25 P.M., the jury returned its verdict of guilty and assessed Washburn's punishment at life imprisonment.

The case had been transferred to Waco on change of venue. There was not much local interest in the trial as the jury was selected on Monday, but by Tuesday afternoon, there were few people in Waco within miles around that had not watched at least a part of Washburn's trial. For the first time a real murder trial was being televised.

#### **World-wide News**

The news went out over the wire services and incredulous editors from all over the United States and across the Atlantic called Waco for more information. Newsmen took thousands of pictures of the trial with still and movie cameras. The world turned its eyes to the Waco courtroom as the story was carried in every major newspaper in the free world. This was news because a television camera was there.

News reporters have for some years been accorded

a place in the courtroom to report trials during the actual proceedings. With the development of photography, radio and television as important media for the dissemination of news and information newsmen wanted to bring their new equipment into the courtroom. Judges and lawyers have, of course, been zealous to maintain the dignity and decorum of the courts and to insure that rights of the parties litigant were not adversely affected by the focusing of a lens representing a vast and unseen audience. The effects a camera might have upon witnesses, the court and the jury were not known, but lawyers knew from experience that a "reasonable man" too often became a clown or a shy child before a harmless box camera.

The American Bar Association adopted Canon 35 of the Canons of Judicial Ethics prohibiting photographing or broadcasting court proceedings and in 1952, televising court proceedings was prohibited in the Canon. Except for a provision allowing supervised televising of naturalization proceedings, the following is the text of the Canon:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

This Canon succinctly expresses the principal objections leveled to allowing radio, television and cameras in courtrooms. Several states have by law prohibited photographs during trials and Rule 53, Federal Rules of Criminal Procedure, provides:

**"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."**

Texas has no such rule or statute, so the question here, as in many other states, is left to the discretion of the trial judge, much as is the control of the behavior of spectators. This may not be an entirely satisfactory solution since, if the objections pronounced by Canon 35 quoted above are valid, cameras, radio and television should be absolutely prohibited.

### **Ban Imposed**

Since the Washburn trial, a California court has refused permission to televise a criminal trial and the Colorado Supreme Court has imposed a ban on the use of cameras and recorders in all trials.

A Denver television station had planned to film and possibly televise the trial of John Gilbert Graham, accused of dynamiting the United Air Lines plane which crashed and killed 44 persons, including his mother. The Court, however, granted a hearing on its ban and evidence will be adduced at the hearing by news and television men in an attempt to have the ban relaxed or removed. The reactions to the telecast of the Waco trial have been requested for presentation at the hearing.

### **Study Underway**

Before the Washburn trial, the American Bar Association had referred Canon 35 to a committee for study after urging that its restrictions should be relaxed or removed.

The question of whether cameras, radio and television should be allowed in trials and if so to what ex-

tent, must be satisfactorily answered. If they are allowed, will they make a spectacle or show of what must be a dispassionate hearing in which truth is the quest? Will the objections raised in Canon 35 be realized?

In hopes that the reactions to the Washburn trial may be of value in reaching a proper answer, the Waco-McLennan County Bar Association has compiled this report.

### **Television**

Bill Stinson, news editor of KWTX-TV, first obtained the consent of D. W. Bartlett, judge of the 54th Judicial District Court, before whom Washburn was being tried, to allow televising of the trial. The attorneys on both sides and the defendant himself either consented or made no objection to the request to televise. Judge Bartlett had previously allowed photographs to be taken in proceedings before him so long as no flash attachments were used and the photographers did not interfere with or disturb the trial. The same restrictions as to special lights, noise and disturbance were imposed upon the television men.

In the 54th Court, there is a balcony around three sides of the courtroom, about 12 feet above the main floor. The television camera was placed in the balcony to the right and rear of the jury box so that the jurors could not see the camera unless they pointedly turned and looked up. The camera pointed toward the judge and witness chair and over the left shoulders of the attorneys.

### **One Cameraman**

One man operated the absolutely silent camera, which had four lenses from 50 mm. to 15 in. for different shots and close-ups. The only other television equipment in the courtroom was on a small table in the bal-

cony behind the jury, where Gene Lewis, KWTX-TV program director, sat silently watching the monitor screen and turning dials on the remote equipment during the telecasting. Occasionally, he murmured into a small microphone a fraction of an inch from his mouth, giving instructions heard only by the cameraman wearing headphones.

The telecasting began at 9:00 A.M. Tuesday morning, December 6, as the judge called the court to order and the indictment was read to the jury. The entire proceedings in open court were televised with the camera focused on the attorneys and witnesses under examination and on the judge as he gave instructions or ruled on objections. Stinson and Lewis, who directed the telecasting, instructed the KWTX-TV cameraman never to direct the camera on the jury. The members of the jury were not shown on the television screen until they brought in their verdict.

All programs and commercials were stopped during the telecasting of the trial and there were no commercials during breaks in the trial except when the regular program schedule was resumed during recesses for meals and in the evenings. No editorial comments were made by television announcers interpreting developments. Brief statements identified the trial and its principals and short explanatory announcements were made when the judge and attorneys retired for a hearing on an objection.

### Still Cameras

Still cameramen were allowed to take pictures during the proceedings provided they used no flash bulbs, did not disturb the trial, and did not interfere with the movements of the attorneys. They were allowed inside the trial area enclosed by the rail, where they sat or stood to take pictures.

At one time, two photographers from a magazine of worldwide circulation were instructed by Judge Bartlett to leave when they stood between the attorneys and the jury to take a picture of a witness.

Thousands of photographs were taken by many cameramen and although there was little or no attempt to hide the fact that they were taking pictures, their actions were apparently no more disturbing than those of the spectators.

### **Movie Cameras**

Movie cameramen filmed part of the trial from various points in the balcony and from the floor of the courtroom. The judge restricted the motion picture cameras to those which were relatively silent and in his office during recesses, he refused to allow the use of some cameras that made rather loud clicking noises.

Two motion picture cameras on tripods about five feet high were placed at the rail a few feet from the jury box while the jury was out for its deliberations. The jury was filmed as it returned the verdict.

### **Press Reporters**

There was a special table for press reporters directly in front of the judge's desk and between the judge and the counsel table. From three to ten reporters sat at the table or nearby, taking notes on the proceedings.

### **Audience Response**

KWTX-TV requested that the viewers of the trial express to the station their opinions of approval or disapproval of televising the trial. The television station reported that they received several hundred, but uncounted, telephone calls which were preponderantly favorable to the telecasting of the trial. They reported

that most of the unfavorable calls were from children or parents who objected to the omission of the children's programs regularly telecast in the afternoon.

Over 1,400 letters and cards were received by KWTX-TV from Central Texans who saw all or parts of the trial over television. They all, except for four, expressed approval and appreciation that the trial had been telecast.

Picking up cards and letters at random from the stacks on tables in the KWTX Studio, a representative of McLennan County Bar found comments such as the following were typical:

"... it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes."

"By all means, give the people the facts. It is educational, constructive and enlightening for the people to SEE and know court procedure."

A minister from a nearby town stated that the telecasting of the trial was excellent and expressed his thanks. Other letters said: "Finest public service ever witnessed." "Give us more current news events in action." "It is a step forward ... to inform and educate the public." "Great example of American freedom." "Most educational matter ever to come out of our TV set."

Apparently most of the people could not see that there were any objections to televising a trial. One card stated "... great example of American freedom. Only narrowminded people could possibly have any objections, and those will be groundless."

A letter said, "I consider this to be the most progressive step that has been taken in civic education. You will, no doubt, receive some criticism; however, it is

my opinion that those who will criticize are those who take no interest in civic problems, or are those who protest any advancement or progress."

A university professor expressed his appreciation for televising the trial and wrote,

"The townspeople, the Baylor Faculty and students think that it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes. I do not think you need to consider any of the adverse criticism, for it could not be legitimately based."

A school teacher wrote in to say that she had shown the televised trial to her children in school and that it was "very educational." One viewer said,

"Almost everyone is interested in a trial of this kind. By seeing it on television, they see with their own eyes and are able to draw their own conclusions. They do not have to read about it in the newspapers written by one reporter expressing HIS opinion."

Along a rather humorous vein, a woman wrote in that she was so absorbed in the trial that she could not miss one word, and that while she was at her television set, she burned a pot of beans she had been preparing for dinner. A husband wrote in that televising the trial was a great thing. "Most noteworthy around our house, is the inescapable fact, that for the first time in years, my ever-loving wife found one thing interesting enough to induce her to get out of bed before 9:00 A.M."

Of the four cards that were found expressing disapproval or objecting to the televising of the trial, three were from Waco and one was from Portland, Oregon. Two of the cards from Waco were unsigned.

## **Objection**

One card signed "Generally, a steady listener" stated that there was more than enough about such an affair in the newspapers without having the TV channel taken up with it. "Falls in the same category as political speeches."

An unsigned member of the P-TA who wrote that she had worked for years on the comic book problem objected that televising the trial brought the "morbid side of human nature into our home and schools . . ."

The one card from Waco that was signed, stated that the trial had little local interest and that her child had been crying for "Mickey Mouse." It is possible that there are more cards objecting to telecasting the trial since the station staff has not had sufficient time to read all of the responses. Bill Stinson, however, stated that there were only about 200 cards and letters that had not been read.

Judge D. W. Bartlett stated that he had received several hundred cards and letters and that they were predominantly expressions of approval and appreciation for allowing the trial to be televised.

## **Interviews Favorable**

During recesses or after the trial, some members of the McLennan County Bar Association interviewed the judge and the attorneys who participated in the trial. Mr. Stinson of KWTX questioned the judge, defense and prosecution attorneys, witnesses, the jury foreman, the defendant Washburn, and several other people who assisted in the trial or watched it in court. All of his interviews were taken on 16mm. film with a sound track. None of the people interviewed expressed any objection or disapproval of televising the trial.

## **Trial Dignified**

The judge stated that the fact that the trial was being televised seemed to dignify the proceedings and that this case was more orderly than any other case of like importance and public interest with as many lawyers involved. He said that there were about seven lawyers on both sides. Judge Bartlett stated that there was no "grandstanding" by the witnesses or the attorneys and that the television camera was no more distracting than a court reporter taking notes or an electric light burning in the courtroom.

The testimony of Mrs. Billy Rogers, a witness for the state, who was on the stand for about 30 minutes, was televised in its entirety. She had heard that the trial was being televised but when she was interviewed after she testified, she said that she had not even seen the television camera. She thought that her testimony had not been telecast.

## **Little Effect**

The foreman of the jury, Mr. Jack Woods, a government teacher at University High School in Waco, said that in the first day of the trial, during a recess, he looked up and saw the television camera in the balcony. He stated that he did not believe that the television camera affected the jurors in any manner. "They probably were a little apprehensive at first when they realized that it was being televised, but within a matter of a few hours, they had apparently forgotten it." He said that he did not see any play made toward the television camera.

From their experience in the Washburn trial, none of the participants expressed any objection to televising future trials in the same manner. Generally, the

response was that they would favor it. Interviews with Judge D. W. Bartlett; Tom Moore, Jr., district attorney of McLennan County; Cliff Tupper, chief counsel for the defendant; Judge Glen J. Jenkins, a defense witness; Mrs. Billy Rogers, witness for the state; and Jack Woods, jury foreman, were transcribed from the sound track of the filmed interviews and are on file in the State Bar office at Austin.

### Poll of Lawyers

A questionnaire was sent to all lawyers of the Waco-McLennan County Bar Association with a letter containing a brief discussion of the news coverage problem and quoting Canon 35. Of the sixty-one lawyers responding, each of whom signed the questionnaire, fifty-nine had observed the trial in whole or in part either from the courtroom or by television.

Including some of the objections expressed in Canon 35, one question was: "IN YOUR OPINION, DID THE FOLLOWING DETRACT FROM THE DIGNITY OF THE COURT, DISTRACT THE WITNESSES OR JURY, OR OTHERWISE DISRUPT THE ORDERLY PROCEDURE OF THE TRIAL?" Of those expressing an opinion, the following is the tabulation:

	YES	NO	% YES
	ANSWERS		
Press Reporters -----	10	39	20.4%
Still Photographers -----	9	37	19.5%
Movie Photographers -----	10	35	22.2%
Television -----	5	47	9.6%
Spectators in Court -----	7	40	14.9%

A question asked if the action of the judge, lawyers, witnesses, jury and spectators, were discernibly affected in any way by the four listed types of news cov-

erage allowed in the trial, press reporters, still photographers, movie photographers and television. Out of about 50 responses in each of the 20 blank spaces for answers, no more than five answered that any of the types of news coverage allowed had any discernible effect. Several responses indicated that the judge was more attentive and that television improved the dignity and decorum of the attorneys trying the case.

**"IN YOUR OPINION, WHICH TYPE OF NEWS COVERAGE ALLOWED IN THE WASHBURN TRIAL WAS THE LEAST DISRUPTING OR DISTURBING OF THE PROCEEDINGS?"** (Answer *press reporters, still photographers, movie photographers, television or others, with any desired explanation. List least disturbing first.*)" Under this question, twenty lawyers expressed no opinion or gave no listing. Of the forty-one who answered, twenty-seven or 65.9%, placed television as being the least disturbing and the remaining fourteen, 34.1% listed press reporters as being the least disturbing. Total scores by preferential voting showed that television was least disturbing of the proceedings, followed in order by press reporters, still photographers and movie photographers.

### **Favorable Impression**

Forty-eight of the lawyers polled answered that the television broadcast of the trial improved public opinion of our system of justice. Six were of the opinion that it hurt public opinion and four felt that there was no effect. Thirty-four felt that telecasting the trial improved public opinion of the legal profession. Eight felt that public opinion was hurt and twelve stated that there was no effect.

Asked which type or types of news coverage they

would be in favor of allowing in future trials, if handled in the same manner as in the Washburn trial, the response was:

	Allow	Refuse	% Allow
Press Reporters -----	53	4	92.9%
Still Photographers -----	43	13	76.7%
Movie Photographers -----	37	17	68.5%
Television -----	49	7	87.5%

Asked about restrictions to be imposed upon press reporters, still photographers, movie photographers, and television if they were to be allowed in future trials, most of the answers indicated that they should not interfere with or disturb the trial. Such things as no noise, no movements, no moving from seats except during recesses, no questions except during recesses, were typical responses.

### Frequent Response

For press reporters, the second most frequent response was that they should keep behind the rail out of the trial area or stay in the audience area. The second most frequent response for still cameras, movie photographers and television was that no flash bulbs or special lights should be used.

Out of sixty answers, forty-seven were of the opinion that leaving the problem of the types of news coverage to be allowed in trials and the restrictions to be imposed on newsmen should be left at the discretion of trial judges as questions arise. Eleven stated that it should not be left at the judge's discretion and two stated that the judge must allow the various types of news coverage.

Out of fifty-six answers, 53.3% indicated that a rule or statute should be adopted in Texas controlling the

types of news coverage to be allowed in criminal trials. Out of fifty-five answers, 50.9% said that a rule or statute should be adopted controlling the types of news coverage to be allowed in civil trials.

It is hoped that this report from the Waco-McLennan County Bar may be of some illumination to those who seek an answer to this problem now confronting our courts. The poll taken of the McLennan County lawyers was directed particularly to opinions formed from the Washburn trial and it would not be proper to generalize the opinions without realizing that they might not be valid in other cases and if telecasting of a trial were handled differently. Few courtrooms have a balcony such as was used in this case, which allowed the television camera and equipment to be operated in an obscure place.

KWTX-TV has prepared a film with sound of about 45 minutes duration of the interviews taken of the various principals in the Washburn trial. Anyone desiring to show this film may make arrangements through Wm. E. Pool, State Bar of Texas, or Waco-McLennan County Bar Association, P. O. Box 118, B. U. Station, Waco, Texas.

Canon 28 of the Canons of Judicial Ethics approved by the Judicial Section of the State Bar of Texas.

### **Improper Publicizing of Court Proceedings**

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and wit-

nesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

(1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.

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Canon 35, Canons of Judicial Ethics of the American Bar Association.

### **"IMPROPER PUBLICIZING OF COURT PROCEEDINGS**

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs

in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

